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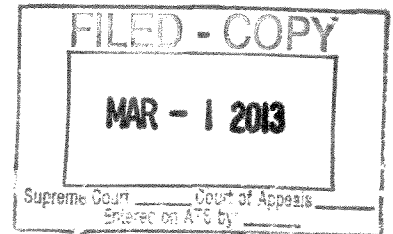
Attorneys for Appellant

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
)
Plaintiff-Respondent,)
)
v.)
)
MARK ANTHONY CRUSE,)
)
Defendant-Appellant.)
_____)

S.Ct. No. 40033-2012
D.Ct. No. 2011-14768 (Bannock)

**APPELLANT'S OPENING
BRIEF**



COMES NOW Appellant Mark Cruse, through counsel Deborah Whipple, and offers this
Opening Brief in accord with IAR 35(h).

Nature of the Case

This is an appeal from the imposition of an excessive sentence and the subsequent denial of a Criminal Rule 35 motion following a guilty plea to a single count of principal to delivery of a controlled substance, cocaine, I.C. § 18-204 and § 37-2732(a)(1)(A) and a single count of possession of a controlled substance with intent to deliver, cocaine, I.C. § 37-2732(a)(1)(A). R 95-100, 116.

Procedural History and Statement of Facts

According to the PSI, an exhibit on appeal, Mark Cruse, age 25, pled guilty to a delivery

of approximately 26.3 grams of suspected cocaine to a police informant on August 22, 2011.

Two days later, when the police executed a search warrant on his home, they found 25.8 gross grams of suspected cocaine which Mark admitted was his. PSI pp. 3-4.

In exchange for Mark's guilty plea, the state dismissed a trafficking charge and recommended a unified sentence of seven years comprised of three years fixed and four years indeterminate. Tr. 3/19/12, p. 5, ln. 12 - p. 6, ln. 5.

At sentencing defense counsel, noting that this was Mark's first felony, asked that Mark be placed on probation or given a rider even if that meant imposition of a greater underlying sentence than the state had requested. Tr. 5/7/12, p. 25, ln. 16 - p. 26, ln. 4.

Mark, who had grown up in Hawaii, explained to the Court that he moved to Idaho all by himself when he was age 19. He got a job and built a life. Then, he had a fall and lost everything. Tr. 5/7/12, p. 30, ln. 21-23. As Mark told the PSI investigator, he lost his house, truck, job, girlfriend and the child he had raised since birth and he had to drop out of college. He was supporting his parents and brother and could not find work. Then, he heard he could make some quick money - payments were due for his parents' vehicle and phone and his brother's rent, so he agreed. He was told all he had to do was hold the drug, someone would come and grab it and sell it and he would get money. PSI p. 4. It was a bad decision and Mark regrets it. Tr. 5/7/12, p. 30, ln. 10-25.

In sentencing Mark, the court stated:

Now, if I was just looking at your history alone and looking at you alone, there are four factors: Protection of society, protection of the community is one. That's the most important. Deterrence, am I going to deter you and others? Am I going to punish you for what you've done, and then rehabilitation of the defendant. If I was going to look at rehabilitation only I'd probably send you on a rider. You're

young enough, your history is not too extensive. That's probably what I would do.

But that's the – I can't make it about you. I told Mr. Sengthavisouk [also convicted of delivery] this last week, same thing. I felt the same way about him. If I was looking at him exclusively and his history, although his dealing history is worse than yours, I still would have given him a shot at a rider. But couldn't do that because I can't be lenient with drug dealers. And that's why the legislature has made the penalty for these two crimes, two penalties that you've pled guilty to, a penalty up to life. That's how serious it is in this state.

So when I impose a three plus four on you for dealing, I am even in that sense being somewhat lenient. So when I take into account that I have to deter other dealers, I have to punish you for what this is. This is a terrible [thing] that you did. You're not a terrible person. You did a terrible thing, and I have to do some kind of protection of our community from drug dealers. I want everybody to get that message.

Tr. 5/7/12, p. 33, ln. 11-p. 34, ln. 25.

The court imposed concurrent sentences of seven years - three fixed followed by four years indeterminate. R 95-100.

Mark thereafter filed a Rule 35 motion for reduction of sentence asking the court to either grant him a rider or reduce his sentence. R 101-103. Mark supported his Rule 35 motion with a letter asking the court for leniency and telling the court that he and a friend had a window washing business in the past that they want to start up again and that he wanted to go back to college to study culinary arts and eventually open a Hawaiian restaurant. R 103-104.

While he was awaiting a decision on the Rule 35 motion, Mark filed a Notice of Appeal. R 105-107.

Thereafter, the district court held a hearing on the Rule 35 motion. At the hearing, Mark explained to the court that he truly regretted his crime and that he was asking for a chance for a rider. Tr. 6/25/12, p. 40, ln. 4-12.

The court, again noting its belief that Mark could be rehabilitated and that he has a lot of potential and can accomplish a lot in life also again noted the importance of deterrence and denied relief. Tr. 6/25/12, p. 41, ln. 7 - p. 42, ln. 25.

Issues Presented on Appeal

1. Did the district court impose an excessive sentence?
2. Did the district court abuse its discretion in not granting Mark's Criminal Rule 35 motion?

Argument

Mark asks this Court to reverse the judgment and commitment entered by the district court because the sentence imposed was excessive. He further asks that the denial of Rule 35 relief be reversed.

Appellate review of a sentence is based upon an abuse of discretion standard. *State v. Justice*, 152 Idaho 48, 52, 266 P.3d 1153, 1157 (Ct. App. 2011).

Where a sentence is not illegal, the appellant has the burden to show that it is unreasonable, and thus a clear abuse of discretion. *State v. Brown*, 121 Idaho 386, 393, 825 P.2d 482, 490 (1992). A sentence may represent such an abuse of discretion if it is shown to be unreasonable upon the facts of the case. *State v. Nice*, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982). A sentence of confinement is reasonable if it appears at the time of sentencing that confinement is necessary 'to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case.' *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). Where an appellant contends that the sentencing court imposed an excessively harsh sentence, [the appellate court] conduct[s] an independent review of the record, having regard for the nature of the offense, the character of the offender, and the protection of the public interest. *State v. Reinke*, 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct. App. 1982). When reviewing the length of a sentence, [the court] consider[s] the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007). In order to prevail on a claim that a sentence represents an abuse of discretion, the defendant must show in light of the criteria,

[that the] sentence was excessive under any reasonable view of the facts. *State v. Charboneau*, 124 Idaho 497, 499, 861 P.2d 67, 69 (1993); *State v. Small*, 107 Idaho 504, 505, 690 P.2d 1336, 1337 (1984). Where reasonable minds might differ, the discretion vested in the trial court will be respected, and [the appellate] court will not supplant the views of the trial court with its own. *Small*, 107 Idaho at 505, 690 P.2d at 1337. In order to prevail, the appellant must establish that, under any reasonable view of the facts, the sentence was excessive considering the objectives of criminal punishment: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *State v. Stover*, 140 Idaho 927, 933, 104 P.3d 969, 975 (2005).

Justice, 152 Idaho at 54, 266 P.3d at 1159.

In conducting a review of the grant or denial of a Rule 35 motion, the appellate court considers the whole record and applies the same criteria used for determining the reasonableness of the original sentence. *State v. Forde*, 113 Idaho 21, 22, 740 P.2d 63, 64 (Ct. App. 1987).

An abuse of discretion occurred in this case because the sentence was excessive considering the objectives of: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing.

As the district court repeatedly noted, Mark has potential and could be successfully rehabilitated. The court's reason for not allowing Mark to participate in the rider program was because the court believed that a longer sentence was necessary to serve as a deterrent to others who would otherwise commit drug offenses. However, the social science evidence is that this reasoning is incorrect.

A longer term of incarceration will not provide any additional deterrent to others. To the contrary, social science research indicates that people obey the law more because they fear the disapproval of their social group and because they generally see themselves as moral beings who

want to do the right thing as they perceive it, than because they see someone else being punished. In fact, the threat of legal punishment has been determined to have a negligible effect on behavior. See e.g., Tom Tyler, Ph.D., "Why People Obey the Law" (New Haven and Yale Press 1990) at p. 65.

In another study, two sociologists found that "despite contemporary predisposition toward the importance of legal sanctions, our findings are . . . consistent with the accumulated literature [demonstrating] the primacy of interpersonal influence [i.e., social disapproval] over legal sanction." Meier, R. F. and Johnson, W. T., "Deterrence as social control: The legal and extralegal production of conformity," American Sociological Review Vol. 42, pg. 302 (April 1977). And another group of sociologists concluded after reviewing the literature on the deterrent effect of punishment that "the preliminary evidence suggests that the perceived risk of punishment has a deterrent effect, *while the perceived severity of punishment does not.*" Paternoster, R., et. al, "Perceived Risk and Social Control: Do Sanctions Really Deter?" Law and Society Review, Vol. 17, p. 457 (1983) (emphasis added).

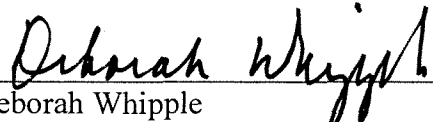
In short, the social science literature on deterrence demonstrates that sentencing Mark to a seven year prison term and not allowing him to participate in the rider program even though he appears to be amenable to rehabilitation will not create any additional general deterrent effect than would allowing a rider. Thus, the district court abused its discretion in not allowing Mark to go on a rider in order to promote general deterrence.

For the same reason, denial of the Rule 35 motion was an abuse of discretion.

Conclusion

Mark asks this Court to reverse the judgment imposing sentence and remand with instructions to impose a rider.

Respectfully submitted this 1st day of March, 2013.


Deborah Whipple
Attorney for Mark Anthony Cruse

CERTIFICATE OF SERVICE

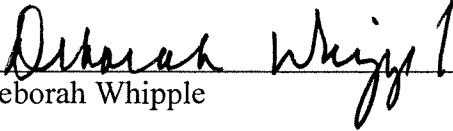
I CERTIFY that on March 1, 2013, I caused a true and correct copy of the foregoing document to be:

1 mailed

___ hand delivered

___ faxed

to: Idaho Attorney General
Criminal Law Division
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Boise, ID 83720-0010


Deborah Whipple